2013 WL 3363666 (Ga.) (Appellate Brief)
Supreme Court of Georgia.

Nathaniel BOYD, Sr. and Lucy Boyd, Plaintiff,
v.
JOHNGALT HOLDINGS, LLC, Defendants.

No. S13A1429.
June 25, 2013.

Fulton County Superior Court Civil Action File No. 2005-CV-107510

**Appellants' Brief**

Francis X. Moore, Esq., Georgia Bar No. 519120, fmoore@fxm-law.com, Lindsey Walker Hillis, Esq., Georgia Bar No. 841039, lhillis@fxm-law.com, Frank X. Moore & Associates, 1847 Peeler Road, Suite D, Atlanta, Georgia 30338, (404) 849-6176, Counsel for Appellants.

## *1 INTRODUCTION

This is another case where the privatized collectors of property taxes in Fulton County, Georgia have targeted and unconscionably **abused** an **elderly**, functionally illiterate couple, Nathaniel Boyd, Sr. and Lucy Boyd (the "Boyds") and summary judgment has been entered against the Boyds by a Special Master on a quiet title claim even though the record established numerous genuine issues of material fact. Even without knowledge or notice of any tax sale of the commercial property they bought in 1984 for $20,000 with borrowed funds which they long ago paid back, the Boyds were intimidated and tricked into paying $7,100 (more than the statutory amount necessary) to redeem their property from the purported tax sale purchaser, only to later be confronted by JohnGalt Holdings, LLC ("JohnGalt") which claimed that those earlier payments would not count, and that they would have to start all over again to pay the redemption price demanded by JohnGalt for the same tax sale.

### *JUDGMENT & ORDERS APPEALED*

In this appeal, the Boyds seek review of the following orders or judgments: (A) that certain Order entered October 23, 2008 in which the trial court, almost three years after Defendant JohnGalt Holdings, LLC ("JohnGalt") filed its answer, granted JohnGalt' s motion for leave to file an omitted counterclaim for quiet title and appointed a special master to determine that claim [R813]; (B) that certain Order entered February 24, 2009 in which the trial court substituted Ned Blumenthal as the ***2** special master and directed the parties to appear before Mr. Blumenthal "for all further proceedings" [R916]; (C) that certain Order Re-Entering Non-Final Judgment and Order entered August 19, 2009 [R1418] which approved and adopted the Special Master's Report dated July 30, 2009 and determined the Special Master's compensation and its allocation (with 25% of the nearly $20,000 self-approved fee being charged to the Boyds) [R1052-R1365]; and (D) that certain Order Granting Defendant's Motion for Temporary Restraining Order [R531].

## JURISDICTIONAL STATEMENT

This Court, rather than the Court of Appeals, has jurisdiction over this appeal because this case involves title to land. Ga. Const. 1983, Art. VI, § VI, ¶ III (1).

## STATEMENT OF THE CASE

**A. Procedural History Including Special Master Rulings on Cross Motions**

Because it is both abnormal and essential to understanding the facts, issues and standards on appeal, the Boyds start by reciting the long and tortured procedural history of this case that threatens their ownership since 1984 of a small commercial property located on a corner of what used to be called Bankhead Highway. Even after it had been warned not to trespass on the Boyd's property and without filing any eviction proceedings, Defendant JohnGalt Holdings, LLC ("JohnGalt") entered upon, cut down trees, and posted a "for sale" sign on the Boyds' property. [R600; T446, 580 (Special Master, Vol II)] On October 13, 2005, the Boyds filed a 7-page complaint ***3** with claims for trespass and ejectment in which they sought compensatory and punitive damages and an order ejecting JohnGalt from their property. [R25] On or about *November 11, 2005*, JohnGalt filed an answer disputing the Boyds' claims and asking for the case to be dismissed. [R25] *No counterclaim was then asserted by JohnGalt, nor would a counterclaim for quiet title be added until more than 3 years later.* [Id.]

The case was twice scheduled for a jury trial and, the second time (in June 2008) it appeared in the first position. [R677] Neither trial took place because of motions for summary judgment filed or orally made by JohnGalt. [R678] In its *August 15, 2008* order granting JohnGalt's motion for an interlocutory injunction, the trial court included a footnote stating, "[s]trangely, neither party has filed an express claim for quiet title, though that cause of action is implicit throughout this case." [R765] On or about *August 26, 2008*, JohnGalt sought leave to file what it referred to as an "omitted and after acquired counterclaim for quiet title." [R775] In its order dated October 25, 2008, the trial court granted JohnGalt's motion to add the omitted quiet title counterclaim and included a *sua sponte* determination that "[b]ecause the case now contains a claim for quiet title, the Court feels the case is suitable for determination by a Special Master" [and] [a]ccordingly appoints Henry D. Fellows as Special Master pursuant to O.C.G.A. § 23-3-61, et seq." [R813].

The parties appeared for a trial before special master Fellows which commenced ***4** on December 19, 2008 and continued on December 22, 2008. [R836] Even though only JohnGalt's case-in-chief was completed (after which the Boyds had made oral and written motions to dismiss or for directed verdict which were orally denied [1] ), special master Fellows abruptly announced that he was withdrawing, and the trial court, without input from or notice to the parties, sua sponte appointed Ned Blumenthal as substitute special master [referred to hereinafter as the "SM Blumenthal"] and ordered that "[t]he transcripts for any and all prior proceedings should be completed within 30 days of the entry of this Order for Mr. Blumenthal's review." [R916] The transcripts of the December 2008 special master proceedings were provided to SM Blumenthal who entered a Scheduling Order establishing deadlines for motions to disqualify and dispositive motions, with a hearing scheduled for July 13, 2009 on said motions. [R918] The Boyds filed a motion to dismiss JohnGalt's quiet title counterclaim (also incorporating their oral motion for directed verdict made at the close of JohnGalt' s evidence at the December 2008 trial before special master Fellows) [R920] and JohnGalt subsequently filed a cross motion for summary judgment [R996]. On July 16, 2009, a hearing on the cross motions was conducted before SM Blumenthal. [R1052] On July 30, 2009, SM Blumenthal issued that certain "Special Master Report, Including Findings of Fact, Analysis, and Conclusions of Law" [R1052-R1365] and delivered it to the trial court together with ***5** a proposed "Final Judgment and Order" that included an award of his own fees to be allocated 25% to the Boyds and 75% to JohnGalt [R1366-R1371]. The same day, the trial court hand-corrected the document to read as a "Non-Final Judgment and Order" and entered it. [Id.]

Because of problems with service, the trial court re-entered the Non-Final Judgment and Order [R1418-R1423], and the Boyds timely appealed [R1-R3] and filed pauper's affidavits. [R1424-R1427]. Even though they were not traversed, the trial court sua sponte construed the Boyds' affidavits of indigence as motions and entered an order denying them [R1437-1438] and, after additional proceedings, dismissed their appeal. [R1473-1475]. The order dismissing the Boyds' appeal was also appealed, and JohnGalt filed a motion dismissing the Boyds' appeal of the order dismissing their appeal. [R1478-R1492]. The trial court concluded that the Boyds' appeal of its order denying pauper's status was not appealable, and again dismissed the Boyds' appeal. [R1551-R1554]. Again the Boyds appealed to this Court (Case No. S11A1689) which transferred the appeal to the Georgia Court of Appeals (Case No. A12A1500). In a full court decision reported at Boyd v. JohnGalt Holdings, LLC, 318 Ga. App.866

(2012), the Court of Appeals reversed the order of dismissal and remanded for a hearing on the trial court's sua sponte challenge to the Boyds' indigency affidavits. [R1571] The trial court subsequently conducted a hearing and entered an order on March 29, 2013 approving the Boyds' right to proceed as paupers ***6** with their appeal of the merits of the rulings in the case [R1597-R1599].

**B. The Boyds and Their Bankhead Property**

Mr. and Mrs. Boyd, both in their late seventies, have been married for almost 60 years. [R347; T9 (Depo of Nathaniel Boyd)] In or about 1980, Mr. Boyd suffered severe injuries while employed as a painter which have required three different surgeries on his back. [T515 (Special Master, Vol II); R347] In or about 1980, the Social Security Administration declared Mr. Boyd to be unable to work and entitled to disability benefits. [T516 (Special Master, Vol II); R347] Those disability benefits have been Mr. Boyd's sole source of income since in or about 1980. [T517 (Special Master, Vol II); R347] Mr. Boyd has been diagnosed with and recently treated for prostate cancer. [R347] In 1996, Mrs. Boyd retired from a job as a glass selector for Owens-Illinois and, since then, has subsisted on a small retirement income from her employment. [Id.] Mrs. Boyd has also recently been diagnosed with and is being treated for cancer. [Id.]

Although both of the Boyds can recognize some words, dates and figures, neither Mr. Boyd nor Mrs. Boyd are able to read and comprehend what they are reading. [T517-518 (Special Master, Vol II); R347] Both of the Boyds are and have for their entire life been functionally illiterate. [Id.] In July of 1984, the Boyds purchased the property located at 2901 Bankhead Highway, NW, Atlanta, Georgia 30309 (the "Property") for the sum of $20,000. [R347] The Boyds borrowed money to pay the ***7** purchase price for the Property. [Id.] The loan that the Boyds obtained to acquire the Property was repaid and, since at least December 31, 1994, the Property has been free and clear of any mortgage or security deed. [T16 (Depo. of Nathaniel Boyd); R348]

Throughout the period beginning at least on January 1, 1994, the Property was zoned for commercial use. [R348] The Boyds purchased the Property for the purpose of investment and intended to either develop and lease retail commercial space or construct a commercial building for a hair salon or barbeque restaurant. [T519-520 (Special Master, Vol II); R348] The Boyds expected the Property to be a source of income to supplement their small disability and retirement income. [R348]

***C. JohnGalt's False Claim to Ownership of the Boyds' Property***

While it falsely claims to own the Property, JohnGalt's false claims are based on a lengthy, convoluted and deceptive trail of documents which purport to include, among many other things, a deed under power whereby a lender purportedly foreclosed against a borrower, which borrower purportedly bid and purchased an interest in the Property based on an alleged but clearly illegal tax sale which purportedly occurred on January 6, 1998 (the "Tax Sale") and purports to be memorialized in a document entitled "Tax Deed" recorded in the Fulton County real estate (the "Clerk's Office)(the "Tax Deed"). [R348-349]

According to the Tax Deed, the Tax Sale was conducted pursuant to a writ of fieri facias (the "Alleged Fifa") issued by Sondra Burnett the Fulton County Tax ***8** Commissioner which, according to the words used in said Tax Deed was "recorded at Book 3273, Page 61 General Execution Docket, Fulton County, and transferred to National Tax Funding at Book 3273, Page 62 General Execution Docket, Fulton County, issued against BOYD NATHANIEL & LUCY". [R349] The document which is recorded at *Book 3273, Page 61* (showing a recordation date and time of March 14, 1997 at 9:00 a.m.) does not even purport to be a *fifa,* and the document which is recorded at *Book 3273, Page 62* (also showing a recordation date and time of March 14, 1997 at 9:00 a.m.) does not even purport to be a *transfer of a fifa.* [R349] For this and other reasons, and even if the Tax Sale did properly occur (which it did not) and even if the Tax Deed was authenticated, admissible and enforceable (which it is not), the Boyds contended that both the Tax Sale and the Tax Deed were null and void and of no force or effect. [R349]

***D. The Boyds Have No Notice or Knowledge of the Tax Machinations***

The Boyds had no notice or knowledge of the Alleged Fifa, the alleged transfer of the Alleged Fifa, the Tax Sale, the Tax Deeds or any notice before on or about October 24, 2003 of JohnGalt's purported attempt to bar their "rights to redeem" their Property after the alleged Tax Sale. [T24-28 (Depo of Nathaniel Boyd; R350] It was the Boyds' habit, custom and practice to go to the public access counter at the Fulton County Tax Commissioner's office to pay the property taxes on the Property and their Home. [R350] According to and in compliance with this habit, custom and practice, ***9** the Boyds would ask the Tax Commissioner's representative for the amount they owed for taxes and then write a check in payment of those taxes. [R350] The Boyds never received any notice that any fifa for allegedly unpaid taxes for 1995 would be issued. [T531 (Special Master, Vol II); R350] The Boyds never received any notice that the Alleged Fifa was going to be transferred. [R351] The Boyds contended that, if, in fact there was a legal and effective purported transfer of the Alleged Fifa, such transfer was illegal and contrary to law and was otherwise null, void and of no force or effect. [Id]

The Boyds are and remain the owners of their Property. [Id] JohnGalt, however, asserts ownership and at various times has taken actions that interfered with and were contrary to the Boyds' right to quiet and peaceful enjoyment of the Property, including but not limited to, boarding up the windows on the building the Boyds had constructed on the Property. [[R351, R600; T446, 580 (Special Master, Vol II)] JohnGalt has also repeatedly claimed to own the Property and has caused the placement of "For Sale" signs on the Property. [Id] The Boyds never received any notice from the Fulton County Tax Commissioner that taxes for tax year the 1995 on the Property were delinquent. [R351] The Boyds never received any notice from the Fulton County Tax Commissioner that a fifa or judgment would be entered against them for 1995 allegedly delinquent taxes on the Property. [Id] The Boyds never received any notice that any fifas relative to the Property were going to be transferred ***10** to any third party non-governmental entity. [R352]

On May 27, 1997, consistent with their habit, custom and practice, the Boyds personally went to the public access counter at the Fulton County Tax Commissioner's office to pay the outstanding taxes on the Property. [R352] Upon arriving at said counter, the Boyds requested that they be told the amount of taxes that were owed on the Property. [R352] In response to the Boyds' inquiry, the Fulton County Tax Commissioner's representative told the Boyds an amount that was due and, as was their habit, custom and practice, the Boyds wrote a check and made payment and requested a receipt for their records. [R352] On May 27, 1997, the Boyds paid all the taxes which they were told were outstanding on the Property and obtained a receipt that appears in the record. [Id. & R371]. At no time when they were paying the taxes in 1997 did anyone at the Tax Commissioner's office or anyone else ever tell them that any fifas had been issued or transferred or that their Property had allegedly been sold at the Tax Sale. [R352] After making payment to the Tax Commissioner in 1997, the Boyds believed that all taxes on the Property were current. [R352] To the Boyds' knowledge, no other person or entity has ever paid taxes on the Property. [R352].

JohnGalt claims that on September 30, 1999, NTF sold the Tax Deed for the Property to Southeastern Diversified Development, Inc. ("SED") and that NTF received a security interest in the form of a Security Deed from SED to secure a ***11** promissory note (the "NTF Security Deed"). [R353] Through a series of transfers and assignments, JohnGalt claims that the NTF Security Deed was assigned to it and that it foreclosed on the NTF Security Deed by virtue of a Deed Under Power dated June 3, 2003. [R353] The NTF Security Deed states that:

The Security Deed shall also constitute a security agreement under the Uniform Commercial Code as enacted in the State of Georgia with respect to all furniture, fixtures and equipment owned by Grantor and located on the Property and all contract rights and general intangible es with respect to the property, including but not limited to, Grantor'S interest in tax deeds and choate and inchoate liens with respect to the property. *Grantee shall have a security interest in the proceeds paid by a taxpayer or other third party in the event any of the Property is redeemed by such party acting pursuant to its rights under Georgia law.* (Emphasis added.)

[R353] The Boyds, who knew nothing about the dealings between the NTF and SED parties, did not discover that their Property had allegedly been sold at a tax sale until in or about October 2000 when Mr. Boyd was attempting to obtain a permit from the Fulton County planning and development department for the building he was constructing on the Property for the purpose of owning and renting out stalls for a beauty shop. [T17-18, 21-22 (Depo of Nathaniel Boyd); R353-354] Mr. Boyd was told

by the Fulton County representative that the permit could not be issued because neither he nor his wife owned the Property. [T19-20 (Depo of Nathaniel Boyd; R354] Mr. Boyd was told by that same representative that he should speak to the Fulton County Tax Commissioner. [R354] Totally baffled and confused, Mr. Boyd immediately went to the public access counter at the Tax Commissioner's office and ***12** requested an explanation of the remarks by the representative in the Fulton County planning and development department. [Id] In response to his inquiries, Mr. Boyd was told that he needed to get in contact with a company called Southeast Diversified, and the same Tax Commissioner representative provided the address for that company. [Id] Upon learning for the first time from the Fulton County planning and development department that someone else was claiming to own their Property, the Boyds were devastated, fearful, dazed, and extremely anxious. [Id] They could not sleep knowing that people were telling them that their hard-earned investment and nest egg was gone. [Id] While it was difficult at times, the Boyds had been careful to meet their financial obligations, and knew that they would never knowingly, willingly or intentionally fail to pay real estate taxes and subject the Property to being sold for non-payment thereof. [R354] The Boyds were stunned, surprised and in total shock upon learning that someone else claimed to own their Property. [Id] Such state of mind has been severely and profoundly compounded by the Boyds' functional illiteracy and feelings of failure and powerlessness. [Id]

The Boyds did not have the means or the ability to understand that they needed to hire an attorney, but believing that there had to be a mistake or some horrible correctable error, Mr. Boyd followed the Tax Commissioner representative's advice and went to the office of SED where he spoke with a man who represented himself to be Mr. Christopher McGee, a representative of SED. [R355] Mr. McGee told Mr. ***13** Boyd that SED owned the Property and had acquired it at a tax sale. [Id] Mr. McGee also stated that if they wanted to get their property back they had to pay $9,751.46 (the “SED Demand”) or they would not own their Property. [Id] Having had an offer to purchase the Property for over $100,000, and believing that the Property was worth at least that much, the Boyds had no intentions of losing their Property. [Id] Believing that the statements made by Mr. McGee on behalf of SED were true, and solely to protect and prevent the unlawful taking of their Property, on or about October 6, 2000, the Boyds agreed to pay the SED Demand and, together with Mr. McGee signed a document entitled Agreement to Payoff Tax Deed (the “SED Agreement”) [R355, R372]. JohnGalt later admitted that the amounts Mr. McGee was demanding exceeded any statutory redemption amount to which SED could possibly have been entitled. [T61-62 (JohnGalt 30(b)(6) Depo. 06/01/06); R355].

Under the SED Agreement, the Boyds made the initial and continuous monthly payments of $250 by delivering checks to SED's office. [R355] The Boyds paid at least $7,100 to SED before SED closed its office, disconnected its phone and belatedly sent a request to the Boyds to send their monthly checks to a Post Office Box. [R355-356] After these events occurred, the Boyds made one more payment of $100 on August 3, 2003, but suspicion caused them to cease making further payments. [R356] Based on the impression of validity given by the Fulton County representatives and believing that Mr. McGee would not lie about such important ***14** matters, the Boyds paid the sum of $7,100 to SED to get back their Property (the “SED Payments”). [Id] On or just days before October 30, 2003, while Mr. Boyd was attempting to locate a physical address for SED, he was referred by an unrelated man, who Mr. Boyd knew to be active in the tax business, to an address of what Mr. Boyd thought was a man named John Galt. [Id] Upon arriving at the address he was given by the stranger, the Boyds met persons who represented themselves as Claire Fishman, Nancy and a man who Mr. Boyd believed at the time to be John Galt. [Id] These people claimed to own the Property, but stated that the Boyds' could get their Property back if they signed a document entitled “Extension of Foreclosure Right to Redeem” (the “Extension Agreement”) and agreed to pay an amount of $6,681.07 (the “JohnGalt Demand”) to JohnGalt which amount was calculated and presented to the Boyds in a letter handed to them when they first went to JohnGalt' s office. [R356-357; R373-375]. The Boyds would later learn that Claire Fishman, the person who prepared the Extension Agreement was a CPA, attorney and had a masters law degree in taxation. [T51-52 (Depo of Nathaniel Boyd); R358]

Being functionally illiterate, the Boyds could not read or understand the Extension Agreement. [T517-518 (Special Master, Vol II)] They only knew, based on what the JohnGalt representatives told them that the Extension Agreement had to be signed if the Boyds were to keep and protect their Property. [R357] The Boyds were not given an opportunity to read and understand the Extension Agreement which ***15** was signed solely in reliance on the false representations of the JohnGalt representatives and under severe emotional and financial duress. [Id] In inducing the Boyds to sign the Extension Agreement, the JohnGalt representatives told the Boyds that SED was gone, that JohnGalt owned the Property, that the Boyds would not get any credit for the amounts they paid to SED, and that the Boyds must pay the JohnGalt Demand or they could not get back the Property

(the "Representations"). [Id] JohnGalt' s Representations to the Boyds, at the time made, were knowingly false. [Id] The Boyds contended that, at the time the Representations were made to the Boyds to induce them to sign the Extension Agreement, JohnGalt: (a) claimed to be a holder of a security interest in the SED Payments or was the owner of same; (b) knew how to contact SED and obtain information from SED; (c) knew that it had no legal or enforceable right to demand monies or the amount of monies they were demanding from the Boyds; (d) knew that the Boyds were entitled to credit for amounts paid to SED; and (e) knew or should have known that the Tax Sale and Tax Deed were defective, illegal, void and ineffectual to pass any title or interest in or to the Property to persons other than the Boyds. [R357-358] At the time the Boyds signed the Extension Agreement, they were not told that the Extension Agreement was contingent on timely payment of property taxes. [R358] Throughout the litigation, the Boyds contended that JohnGalt had no right to demand any monies from the Boyds and that, even if it did have such a right, the amounts it demanded ***16** were not owing, were excessive, and were unlawfully extracted from the Boyds through false and fraudulent pretenses. [Id] On or about June 14, 2004, JohnGalt mailed a letter to the Boyds claiming that the right of redemption was barred effective May 1, 2004 and enclosed a check for $1,500, the amount the Boyds had paid to JohnGalt. [R358; R379] The Boyds did not cash or negotiate the $1,500 check. [T396 & 568 (Special Master, Vol II); R359]

On June 17, 2004, the Boyds, by and through their counsel, rescinded any and all agreements (if any) between JohnGalt and the Boyds (the "Rescission Letter") [R380] and, in October 2005, after JohnGalt entered upon their Property, the Boyds filed this lawsuit and alleged that JohnGalt "wrongfully and illegally asserts ownership and control over the Boyds' Property" and sought damages and an order ejecting JohnGalt from their Property. [R17-R20]. The Boyds later amended their Complaint to assert, in the alternative and "[t]o the extent the Extension Agreement is not void, voidable or unenforceable, JohnGalt had a duty of good faith and fair dealing under any agreements with the Boyds... and breached the Extension Agreement, inter alia, by claiming that the Extension Agreement was contingent on the Boyds' payment of property taxes, demanding payment of property taxes by the Boyds and declaring that the Boyds were in default for failure to make the May 1, 2004 payment and claiming that the Boyds' right of redemption is barred." [R361]. The Boyds also requested that the Extension Agreement be found void and rescinded ***17** and the Boyds receive full restitution for all payments and consideration given thereunder, including all out-of-pocket costs and other expenses and any consequential damages incurred by the Boyds as a result of JohnGalt's actions. [R309; R855; R974].

**E. The Special Master's Findings (on Disputed Facts) and Conclusions of Law.**

In his Order and Judgment, SM Blumenthal failed to construe all facts in a light most favorable to the Boyds, as non-movants, and instead, taking on the role of fact-finder, found that the Boyds' signatures on the Extension Agreement were "tantamount to waivers of any alleged irregularities related to the processes that came before the Extension Agreement (i.e. levy, execution, transfers of the Tax Deed, service of the notice of foreclosure of the right of redemption, etc.)" and that "unless the Extension Agreement is void or otherwise unenforceable, the Boyds' right of redemption has been foreclosed." [R1062] Even while acknowledging the Boyds' sworn testimony that they were "functionally illiterate," SM Blumenthal (who had not witnessed any of the testimony) rejected this evidence, observing that "[Mr. Boyd] read aloud from various documents, both during cross-examination and during his direct testimony" and that "Mrs. Boyd wrote many of the checks to SED and to JohnGalt." [R1063-R1064] Acting as a fact finder (and even though he had not witnessed any testimony), SM Blumenthal made the finding "that the Boyds are not relieved from the Extension Agreement on the grounds of any alleged inability to ***18** read." [Id.] Even while acknowledging that the Boyds' rescinded the Extension Agreement in a letter dated June 17, 2004, SM Blumenthal concluded that the "Boyds only raised rescission in this action when they filed their Verified First Amended Complaint on July 18, 2007" and thus, "the Boyds have not timely sought nor maintained a claim for rescission of the Extension Agreement." [R1064-R1065] Further supporting his rejection of any possible rescission, SM Blumenthal "[did] not find that the existence of fraud or a mutual mistake of fact that would support a rescission claim." [Id.] The Boyds' claims of fraud in its procurement were also summarily rejected because the "Special Master [did] not find any fraud or collusion that would support setting aside the Extension Agreement." [R1065] Without expressly ruling on many of the Boyds' defenses to the quiet title action, the SM found and concluded "that JohnGalt has foreclosed on the right of redemption as to the Boyds; that the Boyds are divested of any claim of title to the Property... and that JohnGalt holds title to the Property free and clear of any claim of, by, or through the Boyds." [R1069] Without any notice or hearing, SM Blumenthal simply awarded himself compensation of $18,700 and,

without any explanation, allocated that fee between the Boyds (25%) and JohnGalt (75%). [Id.; R1419-R1423] Almost seven (7) years after they filed their complaint for ejectment, the Boyds now have the ability to seek appellate review of the rulings in the trial court that granted summary judgment to JohnGalt and denied the Boyds' motion to dismiss.

## *19 ENUMERATION OF ERRORS

1. Whether the Trial Court **Abused** its Discretion by Allowing JohnGalt to Assert an Omitted Counterclaim More than Three Years after its Answer Was Filed and After the Case Twice was Called for Trial.

2. Whether the Trial Court **Abused** its Discretion by Appointing a Special Master and Requiring the Parties to Appear Before That Special Master "For All Further Proceedings."

3. Whether the Special Master Erred in Shifting to the Parties His Obligations on Disqualification.

4. Whether the Special Master Erred by Failing to Apply the Correct Legal Standard to JohnGalt's Motions for Summary Judgment.

5. Whether the SM Erred in Granting JohnGalt' s Motion for Summary Judgment

6. Whether the Special Master Erred in Denying the Boyds' Motions to Dismiss or for Directed Verdict Without Considering, Addressing or Ruling on the Boyds' Arguments.

7. Whether the Special Master Erred in Awarding and Allocating His Own Fees Without Any Notice or Hearing.

8. Whether the Trial Court Erred in Accepting and Approving the Special Master's Report and Compensation

9. Whether the Trial Court Erred in Entering a TRO After Its Recusal.

## *20 ARGUMENT AND CITATION OF AUTHORITY

**A. The Trial Court Abused its Discretion by Allowing JohnGalt to Assert an Omitted Counterclaim More than Three Years after its Answer Was Filed.**

O.C.G.A. § 9-11-13(a) governing compulsory counterclaims, provides in pertinent part as follows: **"A pleading shall state as a counterclaim any claimwhich at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim..."** When it filed its answer in November 2005 (nearly three years before it sought to add its omitted quiet title counterclaim), JohnGalt was fully aware that, if it had such a counterclaim, it was required to file it with its answer. JohnGalt, however, made a conscious decision to refrain from filing any counterclaim whatsoever. "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." O.C.G.A. § 9-11-13(f). JohnGalt provided not even a scintilla of evidence that the failure to file the compulsory counterclaim was due to oversight, inadvertence, or excusable neglect, relying solely on the grounds that "justice requires" that it be allowed to assert a quiet title counterclaim[2]. This tactic, however, was just one of the many devices deployed ***21** by JohnGalt to delay the trial that the Boyds deserved, and to deprive the Boyds of their constitutionally protected rights to a jury trial on their ejectment claim... a *claim that sounds in law, not equity*. Prior to seeking the right to add the omitted counterclaim, the case appeared on two jury trial calendars - the second time in the very first position [R677] and the parties had presented a Consolidated Pretrial Order to the trial court. The allowance of an omitted counterclaim under such circumstances was an **abuse** of discretion and should be reversed. *Cf. Eudaly v. Valmet Automation (USA), Inc.*, 201 Ga.App. 497 (1991) (after imposing

deadlines for motions and for a pre-trial order, the trial court **abused** its discretion in allowing the filing of late counterclaims without a showing of necessity or justice).

JohnGalt claimed that justice requires that it be allowed to file a counterclaim three years late and that the Boyds would not be prejudiced by the addition of such claim. [R712] The Boyds repeatedly minded the trial court that they were aged, infirm and have both been treated for cancer. [R678] JohnGalt's argument that the Boyds would not be prejudiced under these circumstances was appalling, and simply false. The addition of JohnGalt' s new quiet title claim re-opened discovery and opened the Boyds up to more of the same dilatory motion and discovery practice that had kept this case from being decided for three abominably long years. And there was ***22** absolutely no need for a quiet title action. The Boyds pursued an ejectment claim in which they sought to have JohnGalt removed from the property. This is an action at law, as to which the Boyds are entitled to a jury trial pursuant to Ga. Const. Art. I, § I, Para. XI [3] . See also, O.C.G.A. § 9-11-38 ("The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate.").

Furthermore, when considering whether justice would be served by allowing the assertion of a new claim, three years after the claim was available to be added, the trial court was required to (i.e. it "shall") construe the Civil Practice Act "to secure the just, speedy, and inexpensive determination of every action." O.C.G.A. § 9-11-1. JohnGalt' s dilatory motion seeking to expand this case after it improperly caused this case to be removed from the June 16, 2008 trial calendar, should have been rejected and the case put down on the trial court' s next available jury trial calendar. Instead, this case spiraled into oblivion. And, even though the quiet title action was added and then sent to a special master, as noted below, the special master never considered, ruled and issued any written order on the numerous equitable defenses that the Boyds raised and argued. [See, e.g. R1372-R1389] Indeed, because the Boyds had already ***23** filed an action at law for ejectment, the resort to an equitable proceeding was, as a matter of law, barred by O.C.G.A. § 23-1-4 because JohnGalt had an adequate remedy at law (i.e. to merely appear and defend the ejectment action). The Boyds asserted and advanced this defense [See e.g. R884], but neither it nor many of the Boyds other defenses were ever ruled upon in any written order filed with the Clerk.

**B. The Trial Court Abused its Discretion by Appointing a Special Master and Requiring the Parties to Appear Before That Special Master "For All Further Proceedings."**

A trial court is authorized to refer a portion of the litigation to a special master, and the exercise of the trial court's discretion will not be interfered with by appellate courts absent an **abuse** of discretion. *See Alston & Bird v. Mellon Ventures,* 307 Ga. App. 640 (6a) (2010). Here, the trial court provided no notice to the parties before appointing Henry Fellows as the special master, and no notice to substituting Ned Blumenthal as special master after Mr. Fellows abruptly withdrew. Moreover, in neither of the orders appointing either Mr. Fellows or Mr. Blumenthal did the trial court: (**a**) provide the parties notice and an opportunity to be heard before appointing the special masters; (**b**) set forth, among other things, the special master's duties, specific limits on the special master's authority, and standards for reviewing the special master's orders, findings, and recommendations; or (**c**) provide a procedure for addressing disqualification issues. [R813 & R916] Indeed, in the order ***24** substituting Mr. Blumenthal for Mr. Fellows, the trial court simply instructed that "[t]he parties should appear before Mr. Blumenthal for all further proceedings." [R916] The trial court's expansive and unlimited delegation of authority - - all without prior notice or opportunity to be heard being given to the Boyds - - violated the Boyds' State and Federal Constitutional Rights and was, therefore, an **abuse** of discretion. It is axiomatic that notice and an opportunity to be heard are the cornerstones of the Due Process rights guaranteed by our Federal and Georgia Constitutions. *Hood v. Carsten,* 267 Ga. 579, 580 (1997). In both the manner in which the appointments were made and in the expansiveness of the delegation of authority, the trial court **abused** its discretion.

**C. The SM Erred in Shifting to the Parties His Obligations on Disqualification.**

In a Scheduling Order he entered, the special master improperly shifted to the parties his duties regarding disqualification under O.C.G.A. § 15-1-8 and the Georgia Code of Judicial Conduct, Canons 3(E) & (F) by not self-reporting and, instead, requiring

the parties to initiate disqualification. [R918] This abdication by Mr. Blumenthal of his responsibilities under that statute and the Canons was clear error. “All parties before the court have the right to an impartial judicial officer.” *Stephens v. Stephens*, 249 Ga. 700, 702 (1982). The issue of judicial disqualification can rise to a constitutional level since “[a] fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136,75 S.Ct. 623,99 L.Ed. 942 (1955). ***25** See also *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). Judicial integrity is “a state interest of the highest order” because the power and prerogative of a court to resolve disputes rests upon the respect accorded by citizens to a court's judgments which, in turn, depends upon the issuing court's absolute probity. Id. at 889, 129 S.Ct. 2252. The shifting by Mr. Blumenthal of the burdens imposed on him in relation to disqualification under Georgia law to the parties was reversible error, and the case should be remanded with direction for compliance by Mr. Blumenthal of those duties or, in the alternative, for the determination of the pending motions by an independent, impartial, and qualified member of the judiciary.

**D. The SM Erred by Failing to Apply the Correct Legal Standard to JohnGalt's Motions for Summary Judgment.**

Summary judgment may be granted only where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this Code section shall be construed as denying to any party the right to a trial by jury where there are substantial issues of fact to be determined.

O.C.G.A. § 9-11-56 (c). Summary judgment is an extreme remedy and should be only awarded when the truth is quite clear. *Watkins v. Nationwide Mutual Fire Insurance Company*, 113 Ga. App. 801, 802, 149 S.E.2d 749 (1966). Moreover,

> ***26** [a]s to the defendant's motion for summary judgment, the burden of proof is always on the movant, even with respect to issues which the plaintiff would have the burden of proof at trial; the court must construe the evidence in favor of the opposing party, and even mere opinion evidence can be sufficient to preclude an award of summary judgment. On a motion for summary judgment, all doubts as to the evidence and the benefit of any conflict are to be indulged in favor of the opposing party and construed against the movant. If the trial court is presented with a choice of inferences to be drawn from the facts, all inferences of fact must be drawn against the movant and in favor of the party opposing the motion.

*Barlow v. Orkin Exterminating Co., Inc.*, 196 Ga. App. 822, 823, 397 S.E.2d 170 (1990). The evidence in the record and the inferences drawn therefrom required that JohnGalt' s motion for summary judgment be denied. As noted in the fact section, the special master did not abide by the standard for summary judgment, but instead he (a) assumed the role of determining the credibility of witnesses who he never observed testifying; (b) decided disputed issues of fact; and (c) made “findings of fact” that elevated JohnGalt's contentions, arguments, and legal theories to matters-of-law determinations. The special master erred by applying the wrong standard and by invading the province of the fact finder - which should have been a jury. The special master's misapplication of his role manifested itself when he wrote: (a) “the Boyds have not timely sought nor maintained a claim for rescission of the Extension Agreement” [R1064-R1065]; (b) that he “[did] not find that the existence of fraud or a mutual mistake of fact that would support a rescission claim” [Id.]; (c) he “[did] not find any fraud or collusion that would support setting aside the Extension ***27** Agreement” [R1065]; and (d) “that JohnGalt has foreclosed on the right of redemption as to the Boyds; that the Boyds are divested of any claim of title to the Property... and that JohnGalt holds title to the Property free and clear of any claim of, by, or through the Boyds” [R1069].

**E. The SM Erred in Granting JohnGalt's Motion for Summary Judgment**

*1. Issues of Fact Precluded Summary Judgment on Rescission.* The special master determined, as a matter of law, that the Boyds had not done enough to rescind the Extension Agreement, citing *Holloman v. D.R. Horton, Inc.*, 241 Ga. App. 141,

146 (1999). [R1064] In his ruling, the special master acknowledged that the Boyds had rescinded the Extension Agreement in their attorney's letter dated June 17, 2004, but had not included a rescission claim in their initial complaint, and only "raised rescission in this action when they filed their Verified First Amended Complaint on July 18, 2007, three years after their demand for rescission." [Id] The special master was wrong on his facts and his conclusions. The Boyds again raised rescission in their pleadings filed on November 17, 2006 in opposition to JohnGalt's first motion for summary judgment, contending that genuine issues of material fact regarding rescission prevented summary judgment [R248], and again in their July 2007 supplemental pleadings in opposition to JohnGalt s motion for summary judgment [R309]. The parties later filed a proposed Consolidated Pretrial Order in which the Boyds again asserted rescission of the Extension Agreement and sought a judgment ***28** for the funds they had paid under that document. [R853-R855 & R972-R974] Holloman is distinguishable because the plaintiffs in that case had filed their initial complaint to include a breach of contract claim and seeking damages without alleging any cause of action for rescission. Holloman, 241 Ga. App. at 147. Only when faced with a motion for summary judgment did the Holloman plaintiffs amend their complaint to add a count seeking equitable relief and rescission over two years after the case had been filed. Id. Unlike the Hollomans, the Boyds did not include a breach of contract claim in their original complaint. And in its answer *JohnGalt asserted only two affirmative defenses:* (1) that the Boyds' complaint failed to state a claim upon which relief could be granted; and (2) failure by the Boyds to comply with O.C.G.A. § 48-4-47 (i.e. a tender requirement). [R25-R30] Notably, in its answer, JohnGalt neither asserted the Extension Agreement as a defense, nor did it include a counterclaim for any breach of that agreement. [Id.] And, almost a year later, when JohnGalt finally raised the issue of the Extension Agreement in its first motion for summary judgment [R98-R99], the Boyds timely and clearly raised the issue of rescission of that agreement. [R248, R853-R855 & R972-R974] In short, the special master erred in concluding as a matter of law that the Boyds had not properly preserved and maintained their right to rescission of the Extension Agreement. The record contains disputed issues of fact which precluded such a ruling.

*2. Issues of Fact Precluded Summary Judgment on Waiver.* The special master ***29** also concluded, as a matter of law, that the Boyds' signatures on the Extension Agreement with JohnGalt were "tantamount to waivers of any alleged irregularities related to the processes that came before the Extension Agreement (i.e. levy, execution, transfers of the Tax Deed, service of notice of foreclosure of the right of redemption, etc.)" [R1062]. On the issue of waiver, this Court has issued the following binding instructions:

> Waiver is a voluntary relinquishment of some known right, benefit, or advantage, which, except for such waiver, the party otherwise would have enjoyed. Waiver may be established by expressed statements or implied by acts and conduct from which an intention to waive may reasonably be inferred. Ordinarily, mere silence is not sufficient to establish a waiver unless there is an obligation to speak. Questions of the existence of waiver are usually questions to be settled by the trier of fact.

*Jordan v. Flynt,* 240 Ga. 359, 366-367 (1977) (citations and internal quotations omitted). *See also, Small Equipment Co. v. Walker,* 126 Ga.App. 827, 830-831(1972); *Glass v. United of Omaha Life Ins.,* 33 F. 3d 1341, 1347 (11th Cir. 1994). The special master stretched the law of waiver far beyond its breaking point in concluding that the Extension Agreement prepared by JohnGalt' s lawyer/CPA was "tantamount to waivers" of all of the Boyds' defenses - - especially when the word "waive" appears in that document twice, but not once does it provide for waivers of the defects suggested by the special master. [R1352] Based on the clear and unambiguous language of the Extension Agreement, the special master erred in his expansion of the words in that agreement.

***30** "The construction of a contract is a question of law for the court. Where any matter of fact is involved, the jury should find the fact." O.C.G.A. § 13-2-1. When construing the written terms of a contract, courts in Georgia follow three steps: (1) the court decides if the contract language is unambiguous, and if so the court enforces the contract's clear terms; (2) if the contract is ambiguous, the court must apply the rules of contract construction to resolve the ambiguity; and (3) if the ambiguity remains after use of the construction rules, the meaning of the contract must be decided by a jury. *Caswell v. Anderson,* 241 Ga. App. 703, 705 (2000). *See also, Deep Six, Inc. v. Abernathy,* 246 Ga. App. 71 (2000). No construction is required if the document is unambiguous. O.C.G.A. § 13-2-3. *See also First Data POS, Inc. v. Willis,* 273 Ga. 792 (2001). Contract language

is unambiguous if it is capable of only one reasonable interpretation. *Caswell v. Anderson,* 241 Ga. App. at 703. If contract documents are ambiguous, or capable of more than one construction, they must be construed against JohnGalt as the drafter of those documents. See O.C.G.A. § 13-2-2(5); *Western Contracting Corp. v. State Hwy. Dep't,* 125 Ga. App. 376 (1972); *Stern's Gallery of Gifts, Inc. v. Corporate Property Investors, Inc.,* 176 Ga. App. 586, 592-3 (1985). Here, at the very least, the special master should not have concluded, as a matter of law, that the Extension Agreement was tantamount to waivers of virtually every one of the Boyds' defense - especially given the Boyds' age, lack of education, and functional illiteracy.

***31** By concluding that, by signing the Extension Agreement, the Boyds had waived all their defenses relating to the assessment and collection of taxes, the special master apparently believed he could avoid having to address all of the Boyds' defenses to those proceedings. Because he erred in his rulings on waiver and rescission, the Court should reverse these rulings and remand this case for rulings on all of the Boyds' defenses - - many of which required summary disposition in the Boyds' favor.

3. *Issues of Fact Precluded Summary Judgment on Fraud.* There was also more than sufficient evidence in the record to support the Boyds' claims of fraud in defense of the quiet title action. "Fraud, accompanied by damage to the party defrauded, always gives a right of action to the injured party." O.C.G.A. § 51-6-1. "Fraud embraces all the various means which human ingenuity can devise, and which are resorted to by one party to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." Black's Law Dictionary, 5th Ed. "Fraud may [also] be consummated by signs or tricks, or through agents employed to deceive, or by any other unfair way used to cheat another." O.C.G.A. § 23-2-56. "A fraud may be committed by acts as well as words." O.C.G.A. § 51-6-4(a). "Fraud may not be presumed but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence." O.C.G.A. § 23-2-57. According to O.C.G.A. § 23-2-53, "[suppression of a material fact which a party is under an ***32** obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." Here, a lawyer/CPA made statements to the Boyds that the Property would be taken if they did not pay more money. The clear imbalance of power between the parties was more than sufficient to impose a duty on the lawyer/CPA to provide more information to the Boyds than simple commands and threats. Thus, there were more than sufficient facts to support the Boyds' claims that by its conduct and silence, JohnGalt breached its duties owing to the Boyds and committed fraud.

The entire history of JohnGalt's involvement presents more than sufficient facts to establish that its insinuation of itself into the Boyds' title and the subsequent efforts to use those improperly created position to continue to take away the Boyds Property also support another separate theory of fraud that has long been recognized in Georgia.

> Anything which happens without the agency or fault of the party affected by it, tending to disturb and confuse his judgment or to mislead him, of which the opposite party takes an undue advantage, is in equity a surprise and is a form of fraud for which relief is granted.

O.C.G.A. § 23-2-54 (referred to as fraud by surprise). In what is now a very clear and unmistakable pattern, advantages were repeatedly gained by JohnGalt at the Boyds' expense and detriment, through the tactics of subterfuge, misdirection, confusion, shock, or surprise. Instead of allowing JohnGalt to profit from its participation in ***33** these forms of fraud, it should be held accountable for its misconduct. The Boyds' amended complaint and the record in this case (set forth above) sets forth extensive and detailed facts that establish JohnGalt's sinister and manipulative tricks, subterfuge, and deceit which were all designed to cheat the Boyds out of their Property. The special master erred in ruling, as a matter of law, that the facts taken in a light most favorable to the Boyds failed to support their claims for fraud and, for the same reason, he erred in continuing to exercise equity jurisdiction over the JohnGalt's quiet title action.

4. *Issues of Fact Existed as to Whether the Boyds Had Redeemed.* The Boyds presented checks proving that prior to October 2003 they had paid at least $7,200 to redeem the Property from the alleged tax sale at which, according to the Tax Deed, the purchaser paid $2,685.03. [R104 & R355-356]. JohnGalt would later admit that the amount to redeem as of October 2003 was less than $7,200, thereby establishing that the Boyds had complied with O.C.G.A. § 48-4-40(1) and redeemed the Property as a

matter of law. JohnGalt was bound by the dealings between the Boyds and SED because it was on notice of the Boyds' equitable rights and interests and, therefore, whatever it acquired from SED was subject to those rights and interests. O.C.G.A. §§ 23-1-16 & 23-1-17. *See also, Decatur County Bldg. & Loan Ass'n v. Thigpen,* 173 Ga. 363 (1931). All that JohnGalt obtained after the execution of the deed under power was the rights of SED, whose rights were governed by the agreement with the ***34** Boyds to redeem. The record contained more than sufficient facts that, when taken in the light most favorable to the Boyds, created genuine issues of material fact as to whether the Property was fully redeemed from the sale.

**F. The Special Master Erred in Denying the Boyds' Motions to Dismiss or for Directed Verdict Without Considering, Addressing or Ruling on the Boyds' Arguments.**

While the special master concluded that many of the Boyds' tax collection defenses were barred by failure to rescind the Extension Agreement or by waiver, he never issued a written order indicating that he considered or actually expressly ruled on the Boyds' detailed defenses to JohnGalt's equitable quiet title action or his equitable jurisdiction - - defenses that could not have been raised or waived until the litigation began. After JohnGalt was allowed to file an omitted counterclaim, the Boyds filed a detailed Answer to Quiet Title Counterclaim [R877-R900]. The special master, however, failed and refused to rule on these defenses, even after the Boyds filed a motion for voluntary compliance with the duties under O.C.G.A. § 15-6-21. [R1372-R1389 & R1397-R1411]. The Boyds respectfully submit that it was error for the special master to presume equitable jurisdiction, only to ignore the Boyds' defenses to that jurisdiction.

**Under the Appellate Practice Act the well established rule that 'what the judge orally declares is no judgment until it has been put in writing and entered as such,' is still of force, and both a written judgment and *35 its entry by filing the writing with the clerk are essential prerequisites to an appeal.** (Citations omitted and emphasis added)

*Boynton v. Reeves,* 226 Ga. at 202-203. See also, *Titelman v. Stedman,* 277 Ga. 460, 461; 591 S.E.2d 774 (2003) (Until an order is signed by the judge and filed with the Clerk, it is ineffective for any purpose and there can be no appeal from an oral announcement that a judgment will be rendered, since no judgment is effective until it is signed by the judge and filed with the clerk); *Seabolt v. Seabolt,* 220 Ga. 181 (1964)("The record does not contain a judgment in writing overruling the motion. In the absence of a judgment in writing no question for decision is presented to this court."); *Construction and Gen'l Laborers Union, Local No. 246 v. Williams Construction Co.,* 212 Ga. 691 (1956)("What the judge orally declares is no judgment until it has been put in writing and entered as such. Since no judgment in writing overruling the demurrer to the petition was entered, the exception to the oral announcement of the trial judge presents no question for decision by this court, and the bill of exceptions must be dismissed.")

This Court should reverse and remand with express direction that the trial court consider and enter express written rulings on all such defenses which the Boyds advanced and argued in their pleadings [See, e.g. R877-R900], during the aborted special master proceedings before Mr. Fellows and in the hearing before Mr. Blumenthal.

***36 G. The Special Master Erred in Awarding and Allocating His Own Fees Without Any Notice or Hearing.**

The special master erred in awarding himself fees and expenses of almost $20,000 and requiring the Boyds to pay 25% of his fees without giving the Boyds any notice or opportunity to be heard on such matters. The limits on a trial court's authority to award costs in an equitable proceeding has been addressed in *Hamilton v. Du Pre,* 103 Ga. 795 (1898) where this Court stated:

> In equitable cases, it is, under section 4850 of the Civil Code, the duty of the judge to determine upon whom the costs shall fall; but he has no arbitrary power in this respect. On the contrary, he should exercise a sound discretion in deciding by whom the costs shall be paid.

*Hamilton v. Du Pre*, supra. In *Du Pre*, this Court reversed the trial court's award of fees against the plaintiff, Ms. Hamilton, who was successful at trial in restraining the sale of her property which had been placed in the possession of a receiver. Id. Concluding that the plaintiff "did nothing that was not absolutely essential to the protection of her rights" the Court stated that charging her with the costs of the receiver was a "decidedly inequitable result." Id.

Similarly to Ms. Hamilton in *Du Pre*, in the special master proceedings, the Boyds are simply defending the title to their property against JohnGalt's quiet title claim. Indeed, they expect to be successful in doing so, although a final ruling making such determination will have to await the completion of this appeal and ***37** further proceedings. Under *Du Pre*, it would be an **abuse** of the trial court's discretion to charge the Boyds with any costs if they are ultimately successful in defending against JohnGalt's quiet title counterclaim. Thus, at a minimum, both the special master and the trial court erred by requiring the Boyds to pay the Special Master's fees prior to a final determination of the ownership of the Property and without any notice or opportunity to appear and object to those fees and any allocation thereof. All litigants have fundamental rights to notice and an opportunity to be heard. *United States v. Powerstein*, 185 F. App'x 811, 813 (11th Cir. 2006). See also, *Nix v. Long Mountain Resources, Inc.*, 262 Ga. 506, 509 (1992) ("The fundamental idea of due process is notice and an opportunity to be heard"). The denial of the defendant's "right to present evidence would constitute a violation of his due process rights under the Constitution." *Sawyer v. Dogwood Stables, Inc.*, 157 Ga. App. 534, 536 (1981). Such basic or fundamental rights derive from our United States and Georgia Constitutions. See U.S. Const., Fifth Amend.; U.S. Const. Fourteenth Amend.; Ga. Const. Art. I, § I, ¶ I; Ga. Const. Art. I, § I, ¶ II.

**H. The Trial Court Erred in Accepting and Approving the Special Master's Report and Compensation**

The very same day it was delivered to the trial court, and order and judgment was entered as proposed by the special master, and re-entered. [R1366 & R1418] For all the reasons provided above which demonstrated the special master's errors, which ***38** reasons are incorporated herein, the trial court erred in approving and adopting as its own orders or judgments the special masters report and judgment and order.

**I. The Trial Court Erred in Entering a TRO After Recusal.**

On or about October 4,2006, JohnGalt filed a motion for summary judgment and requested oral argument ("JohnGalt's First MSJ"). The Boyds timely opposed JohnGalt's First MSJ [R244-R284], a hearing was scheduled on July 18, 2007 and, prior to the hearing, the Boyds filed their "Verified First Amended Complaint" [R345]. JohnGalt, with the Plaintiffs' consent, requested and obtained a continuance of the hearing scheduled for July 19, 2007. [R676] Based on conversations between their counsel, Plaintiffs understood that one of the reasons for seeking or accepting the benefit of a continuance was JohnGalt's desire and intention to file an additional motion for summary judgment to address the additional facts and claims set forth in the Verified First Amended Complaint. [R677] Contrary to its stated intentions, JohnGalt filed no further motions for summary judgment and the case was placed on a jury trial calendar for June 17,2008 (where it occupied position number 1). [R677] As is apparently the custom and practice of the trial court, a hearing on the pending motion for summary judgment was scheduled for the morning the case was being called to trial. Id. Even though the case was on the trial calendar and a year had gone by without any changes or additions having been made to the First MSJ, JohnGalt's attorney attempted to orally amend and supplement its First MSJ by adding new ***39** theories on which it was seeking summary judgment all with the objective of avoiding or delaying the trial that was scheduled to commence that very morning. [T2-3 (Hearing, 06/17/08)]

Instead of rebuking JohnGalt's counsel for violating Uniform Superior Court Rule 6.6, the trial court allowed the oral modification over the Plaintiffs' objections [T5 (Hearing, 06/17/08)] When Boyds' counsel argued that it would be improper to allow JohnGalt, on the very day trial was to start, to orally modify or add new theories to a prior motion for summary judgment, the trial court reset or continued the trial so that JohnGalt could file additional papers to assert the new theories in support of its motion for summary judgment. [T5-6 (Hearing, 06/17/08)]. Thereafter, the trial court entered orders in which she: (a) voluntarily recused herself [R528]; and then (b) entered an Order Granting Defendant's Motion for Temporary Restraining

Order ("TRO")[R531]. Because the trial court had determined that she was required to recuse herself, she should not have thereafter entered the order granting the TRO. *See, Probst v Morgan,* 288 Ga. 862, 864 (2011) (Proceedings and rulings made after recusal was required are "invalid and of no effect."). *See also, Gillis v. City of Waycross,* 247 Ga.App. 119, 122 (2000); *Gray v. Barlow,* 241 Ga. 347, 348-349 (1978). The TRO was improperly entered and it should be reversed.

## CONCLUSION

For the foregoing reasons, the Boyds respectfully request that this Court reverse ***40** the referenced orders, reports and judgments and remand this case to the trial court with instructions as requested herein.

Footnotes

1 The oral rulings were not put in writing and filed with the Clerk.

2 Indeed, it is quite clear that the motivation behind JohnGalt's belated filing was the inclusion by the trial court of footnote 2 in its August 15, 2008 order in which the trial court gratuitously offered "[s]trangely, neither party has filed an express claim for quiet title, though that cause of action is implicit throughout this case." [R765]

3 "The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party." Ga. Const. Art. I, § I, Para. XI.

**End of Document**